BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BRENDA J. STOREY	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,021,169
THE BOEING COMPANY	)	
Respondent	)	
AND	)	
	)	
INDEMNITY INSURANCE COMPANY	)	
OF NORTH AMERICA	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the October 4, 2007, Award entered in this review and modification proceeding by Administrative Law Judge John D. Clark. The Workers Compensation Board heard oral argument on December 11, 2007.

APPEARANCES

W. Walter Craig of Derby, Kansas, appeared for claimant. Kirby A. Vernon of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This appeal stems from a review and modification proceeding initiated by respondent. In an October 20, 2006, Award, claimant was awarded benefits for a 62.5 percent permanent partial general disability under K.S.A. 44-510e for bilateral upper extremity injuries. In light of the recent *Casco*[1] decision, which held bilateral upper

[1] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007).

extremity injuries should be compensated as two scheduled injuries under K.S.A. 44-510d rather than as an unscheduled injury under K.S.A. 44-510e, respondent filed an application for review and modification. In the October 4, 2007, Award, Judge Clark denied respondent's application for review and modification. The Judge ruled the initial finding that claimant's permanent injuries were to be compensated under K.S.A. 44-510e as an unscheduled injury should not be modified under the doctrine of *res judicata*.

Respondent contends the October 20, 2006, Award should be modified as it does not comport with the law set forth in *Casco* and, therefore, claimant's permanent partial general disability benefits are excessive. Respondent argues *res judicata* does not apply as the doctrine "'does not apply to the determination of [a]wards which are subject to review and modification.'"[2] In addition, respondent argues the doctrine does not apply as respondent is not seeking to relitigate the degree of claimant's disability but, instead, simply seeks recalculation of the October 20, 2006, Award using the law set forth in *Casco*. In its brief to the Board, respondent wrote, in part:

> There is no dispute that the present Application for Review and Modification does not involve a change of condition of claimant. Moreover, respondent does not seek to re-litigate issues of compensability, employer or employee status or even degree of disability. Respondent simply asks the finder [of] fact to recalculate the Award based upon the correct analytical method announced by the Court in *Casco v. Armour Swift-Eckrich*.[3]

In short, respondent requests the Board to modify the October 20, 2006, Award and grant claimant permanent disability benefits under the schedule of K.S.A. 44-510d for a 10 percent impairment to the left upper extremity and a 10 percent impairment to the right upper extremity.

Claimant requests the Board to affirm the October 4, 2007, Award denying respondent's application for review and modification. Claimant argues the doctrine of *res judicata* does apply as the Judge initially found claimant's injuries were not included in the schedule of K.S.A. 44-510d and, therefore, those injuries were to be compensated under K.S.A. 44-510e. In addition, claimant contends respondent is requesting to relitigate the degree of claimant's disability, which is not permitted by either statute or case law. And finally, claimant argues the *Casco* decision should not be applied retrospectively.

The issues before the Board on this appeal are:

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[2] Respondent's Brief at 2 (filed Nov. 8, 2007).

[3] *Id.* at 3.

1. Is respondent entitled to review the initial finding that claimant's bilateral upper extremity injuries were outside the schedule of K.S.A. 44-510d and, therefore, those injuries were to be compensated under K.S.A. 44-510e?

2. If so, how should the October 20, 2006, Award be modified?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the parties' arguments, the Board finds and concludes the October 4, 2007, Award should be affirmed.

In the October 20, 2006, Award, Judge Clark found claimant sustained permanent injuries to her bilateral upper extremities and, following precedent, awarded claimant permanent disability benefits under the formula set forth in K.S.A. 44-510e. That Award was not appealed.

On March 23, 2007, the Kansas Supreme Court rendered the *Casco*[4] decision, which set aside 75 years of precedent by holding two upper extremity injuries were no longer to be compensated as an unscheduled injury under K.S.A. 44-510e. Instead, the Supreme Court held those injuries were to be compensated as two separate scheduled injuries under K.S.A. 44-510d.

Respondent then initiated this review and modification proceeding to set aside the award entered in the October 20, 2006, Award. Respondent does not allege there has been any change in claimant's permanent impairment, post-injury earnings, or work status. Respondent's sole reason for seeking modification of the October 20, 2006, Award is that claimant's permanent disability benefits are excessive as *Casco* changed how claimant's bilateral upper extremity injuries should be compensated.

The Workers Compensation Act provides that any party to the workers compensation proceeding may request review and modification of an award. The review and modification statute provides, in part:

> Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two

[4] *Casco*, *supra*.

> health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.[5]

Not all findings, however, may be reviewed. The Kansas Supreme Court in *Randall*[6] held that findings of past fact are not subject to review. An exception exists, however, when an award has been obtained by fraud or undue influence, neither of which has been alleged in this claim.

The Board concludes *res judicata* precludes modifying the October 20, 2006, Award as respondent seeks to modify a finding regarding a past fact. Before awarding permanent disability benefits in any workers compensation proceeding, the judge must first decide whether an injury is included in the schedule of K.S.A. 44-510d. That is a combined question of law and fact.

In the October 2006 Award, the Judge determined claimant's bilateral upper extremity injuries were not included in the schedule of K.S.A. 44-510d. Conversely, the Judge found claimant's injuries were to be compensated under K.S.A. 44-510e. When respondent did not appeal the October 20, 2006, Award, those findings became final. To now litigate whether claimant's injuries were or were not included in the schedule of K.S.A. 44-510d is relitigating a past fact.

In addition, when respondent did not appeal the October 20, 2006, Award, the finding that claimant's bilateral upper extremity injuries were to be compensated under K.S.A. 44-510e became the law of the case. And the law of the case is not an element that can be modified or changed in a review and modification proceeding.

In *Collier*,[7] the Kansas Supreme Court stated:

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[5] K.S.A. 44-528(a).

[6] *Randall v. Pepsi-Cola Bottling Co., Inc.*, 212 Kan. 392, 510 P.2d 1190 (1973).

[7] *State v. Collier*, 263 Kan. 629, 631, 632, 952 P.2d 1326 (1998).

> The law of the case doctrine has long been applied in Kansas and is generally described in 5 Am. Jur. 2d, Appellate Review § 605 in the following manner:
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> > "The doctrine of the law of the case is not an inexorable command, or a constitutional requirement, but is, rather, a discretionary policy which expresses the practice of the courts generally to refuse to reopen a matter already decided, without limiting their power to do so. This rule of practice promotes the finality and efficiency of the judicial process. The law of the case is applied to avoid indefinite relitigation of the same issue, to obtain consistent results in the same litigation, to afford one opportunity for argument and decision of the matter at issue, and to assure the obedience of lower courts to the decisions of appellate courts."
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> . . . .
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> The cases stating this rule are legion in number, and the rule has been applied in many Kansas cases.

And in *Finical*,[8] the Kansas Supreme Court stated: "We repeatedly have held that when an appealable order is not appealed it becomes the law of the case."

In summary, review and modification is not appropriate in these circumstances. The review and modification statute was primarily intended to correct original awards of compensation that later prove unjust because of a change in a worker's condition or circumstances.[9] Accordingly, the Board affirms the October 4, 2007, Award.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[10] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms the October 4, 2007, Award entered by Judge Clark.

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[8] *State v. Finical*, 254 Kan. 529, 532, 867 P.2d 322 (1994).

[9] See *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 2d 527, 531, 598 P.2d 544 (1979).

[10] K.S.A. 2006 Supp. 44-555c(k).

IT IS SO ORDERED.

Dated this ____ day of January, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: W. Walter Craig, Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge